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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **DECIDED ON: 06.05.2014**

\+ ITA 206/2014

COMMISSIONER OF INCOME TAX (CENTRAL)-II ..... Appellant
Through: Ms. Suruchi Aggarwal, Sr. Standing Counsel with Mr. Judy James, Jr. Standing Counsel.

versus

SMT. KUSUM GUPTA .... Respondent
Through: Mr. Prakash Kumar, Advocate.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE VIBHU BAKHRU

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

1. The Revenue claims to be aggrieved by an order of the Income Tax Appellate Tribunal (ITAT) dated 25.10.2013 and urges that the treatment of ₹70,77,375/- by it and the CIT (A) as long term capital gain in the facts of the case is erroneous.

2. The assessee filed the return of income declaring ₹6,16,070/- in respect of AY 2007-08. In this, she had claimed ₹70,77,375/- as long term capital gain and, therefore, exempt under Section 10 (38) of the Income Tax Act. The Assessing Officer by his order holds that the assessee carried on the business of shares and securities and had a closing stock of shares valued at ₹2,19,15,145/- in that business and,

consequently, a sum of ₹70,77,375/- was in reality business income. The CIT (A) on being approached by the assessee reversed the findings of the AO after analyzing the nature of the share holdings, dates of purchase of shares, the respective dates on which they were sold as well as the sale price. The CIT (A) also noticed the law applicable on the issue and further took into consideration the fact that the shares were shown in a separate investment account having regard to the copy of the returns filed for the previous assessment years, i.e., 2001-02, 2002-03, 2003-04, 2004-05, 2005-06 and 2006-07. These had consistently shown investments and closing stock separately. The CIT (A) noticed that in the balance sheet as on 31.03.2006, the investment shown was ₹3,67,81,204/- and the closing stock was ₹1,59,75,712/-. The closing stock related to traded shares, whereas the investments related to house property, bank bonds and various shares that were sold during the year and for which capital gain had been claimed. The CIT (A) further found that the assessment year was not the first time when the assessee has shown separate assessment in her balance sheet; he also verified the profit and loss account of the assessee for the previous 7 years. Thereafter, he applied the law declared by the Courts on the subject and also noticed the CBDT Circular No.4/2007 which carved out the principles applicable to determine whether a profit or income is to be characterized as business income or capital gain. On a proper application of these, he held that the income was long term capital gain and directed it to be deleted.

3. The Revenue's appeal to the ITAT was dismissed by the

impugned order. The findings of the ITAT in this regard are as follows: -

> *"7. We have heard the rival submissions and perused the material available on record. On a consideration of the same, we are of the view that in the peculiar facts and circumstances of the case and considering the case law relied upon by the Revenue and the assessee and considered by the AO and the CIT (A), the departmental ground deserves to be dismissed. The arguments based on the suspicion of the Ld. CIT DR which have been orally canvassed and also by way of write-up filed subsequently it is seen stands fully addressed by the assessee in the impugned order itself. The same are found reproduced in the order and have been taken into consideration by the CIT (A) while passing his order. These arguments addressing the departmental suspicion are reproduced in page 4, 5 & 6 of the impugned order and have also been extracted by us in paras 3.2 to 3.4 in the earlier part of this order. Similarly it is seen that the facts taken into consideration qua the issue arising out of sale of 25,000 shares of OASASCIN purchased on 08.01.2005 at the cost of Rs.1,68,875 and sold on specific different dates have not been disputed by the department as no evidence to the contrary has been relied upon. The number of shares, the date of purchase and dates of sale at the prices of specific number of shares as set out in the impugned order in para 3.1 at page 2 of the order extracted at page 6 of this order has not been shown to be incorrect by the Revenue. Considering the entire arguments advanced on behalf of the Revenue it is seen that none of these facts are disputed neither the dates are disputed nor the nos. of shares nor the price of sale or purchase. The department has also not attempted to upset the finding of the CIT(A) inasmuch as that the assessee was maintaining two separate portfolios one for Investment and one for business. Similarly the finding that there was no intermingling of shares in the two portfolios and that the two were separate and distinct has also not been shown to be incorrect on facts. The settled legal position permits the assessee to maintain two separate portfolios which admittedly*

has been done. This findings is found recorded in para 3.3 of the impugned order which has been extracted in page 8 & 9 of this order. Similarly the fact that this was not the first year when the assessee has shown separate investment in her balance sheet has been taken into consideration by the CIT (A) who has considered the copies of the balance sheet for the last 7 years which was found to support the facts that the assessee has regularly been maintaining two separate portfolios which finding is recorded in para 3.3.1 of the impugned order, nothing has been placed before us by the Revenue to upset this finding. It is also seen that the CIT (A) records that he has personally verified the position for the last 7 years from the P&L A/c of the assessee as well as the inventory of closing stock and then has come to a finding that neither during the year nor in the earlier years the assessee has ever traded in those shares which are kept as an investment. No attempt has been made by the Revenue to upset this finding as the line of argument adopted by the Ld. CIT DR is not supported by placing anything before us in order to canvass that a contrary view be taken. Thus it is seen that the finding that all along the assessee demonstrated that she had an intention to maintain two separate portfolios wherein there was no mixing up in the two portfolios remains unrebutted on record as nothing to the contrary has been placed by the Revenue before us. It is seen that none of these relevant facts have been assailed by the Revenue and only general arguments have been advanced. It is further seen that the finding that there is no intermingling of shares in the two portfolios has been verified by the CIT(A) after considering the balance sheets of the last 7 years and also the P&L A/c. Nothing has been placed before us by the Revenue in order to take a contrary view. In fact the CIT (A) takes into consideration the fact that the AO was himself contradicting his own action because if he was of the opinion that there was only one portfolio then he ought to have taken the entire investment in shares as appearing in the balance sheets towards the closing stock of shares at cost or market price whichever was less and worked out the profit of the trading business which the AO has not done. The finding is also recorded that the AO even

in the immediately preceding year i.e. 2006-07 assessment year when the investment in the said shares i.e. OASASCIN was shown for the first time in the balance sheet as it was purchased admittedly on 08.01.2005 has accepted the position and thereby accepted the position of two separate portfolios. Similarly the factum of maintaining two separate portfolio was found to be correct even on a perusal of the position emanating from the 143(3) order of the AO in 2002-03 assessment year.

These findings found recorded in para 3.3.2 have not been assailed by the Revenue. No evidence to the contrary upsetting these findings as incorrect finding has been placed before us. Similarly the holding period has also not been argued to be incorrect which is more than one and a half year or more. The reliance placed on the assumption of the AO that earning of the dividend is the only acceptable criteria for making an investment does not have any relevance as investments can be made with the objective to earn profit on appreciation also and we find no good reason to interfere with the said conclusion. The general arguments advanced on behalf of the Revenue that the attitude to purchase in a falling market and sell in a rising market is a ground to interfere with the finding to our minds may have relevance if the case of the Revenue is that the assessee is manipulating the market which admittedly is not the case of the department. The judgements and the case laws relied upon by the Ld. CIT DR, it is seen operate on entirely distinct and separate peculiar facts and circumstances, the arguments that the AO is not fettered by technical rules of evidence is a settled legal position and it is an accepted legal position that all relevant circumstances which appear on the issue and the material which may not strictly be evidence under the Indian Evidence Act can be taken into consideration by the AO to inquire probe and consider however in order to lead to the conclusion that material which is not *an evidence to justify the addition has been that material which has the sanctity of a fact. As such the judgements relied upon in the context of the said proposition addressing the settled legal position and cannot be read out of context. The judgements relied upon in*

the context of the proposition that res judicata does not apply to income tax proceedings canvassing that a settled position can be changed are also distinguishable as in order to come to the said conclusion in each and every case facts have to be referred to for consideration of the Courts/Tribunals in order to justify interference and change from the settled position by demonstrating that facts as originally considered in some stray year may have not been correctly presented and a different conclusion is legally justified on facts. In the facts of the present case as observed no fact has been brought on record by the Revenue to justify that the past position of the last 7 years taken into consideration by the CIT (A) to show that the assessee was maintaining two separate portfolios one where shares were held in business portfolio and the other where separate portfolio reflecting shares held in the investment portfolio is not a correct fact. The mere argument that there is intermingling of shares in the two portfolios has to be demonstrated by facts and evidence which admittedly has not been attempted by the Revenue let alone done. Accordingly placing reliance on the judgements to take a contrary view where in the facts of those cases intermingling of the shares is an accepted fact is of no help to the Revenue as the basic fact to trigger the applicability of those principles is conspicuous by its absence. The very basic fact not having been established by the Revenue that there was intermingling of shares amongst other accepted facts as discussed earlier makes the attempt to rely on legal principles on different facts a wasted exercise. In the absence of any fact in contradistinction to the finding concluded in the impugned order. We find no good reason to deviate from the finding and conclusion arrived at the impugned order. Being satisfied by the reasoning and finding arrived at on the facts as they stand the departmental ground is dismissed."

4. This Court has carefully considered the submissions. The Revenue has essentially reiterated its contentions that were urged before the ITAT and pointed out what, at best, can be charitably

termed as prejudicial arguments. The fact remains that for the concerned period, i.e., AY 2007-08, the findings of the CIT (A) - found in paragraph 3.2 to 3.5 were gone into by the ITAT in its elaborate order. The reasoning of the ITAT, in our opinion, is in conformity with the law declared by the Supreme Court in several decisions such as *CIT v. Sutlej Cotton Mills Supply Agency Ltd.* 100 ITR 706 (SC) and *Commissioner of Income Tax v. H. Holck Larsen*, (1986) 160 ITR 67 (SC).

5. In this view of the matter, we hold that there is no substantial question of law for our consideration. The appeal being devoid of merit is, accordingly, dismissed.

S. RAVINDRA BHAT
(JUDGE)

VIBHU BAKHRU
(JUDGE)

MAY 06, 2014
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